

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DENNIS ALLEN, MARY JANE
CRACRAFT, LELAN LITTRELL and
GLASS, MOLDERS, POTTERY, PLASTIC
AND ALLIED INDUSTRIAL WORKERS,
LOCAL NO. 41, AFL-CIO,

Plaintiffs,

vs.

LEONARD D. KRISTAL, and JOHN L.
CRARY,

Defendants.

JOHN L. CRARY,

Cross-Claimant,

vs.

LEONARD D. KRISTAL,

Cross-Defendant.

JOHN L. CRARY,

Third-Party Plaintiff,

vs.

SHIRLEY MONROE, SHIRLEY MONROE,
JAMES THELAN,

Third-Party Defendants

Case No: C-1-01-159

Judge Herman J. Weber
Magistrate Judge Timothy S. Hogan

DEFENDANT JOHN L. CRARY'S
COUNTER-STATEMENT OF FINDINGS
OF FACT AND CONCLUSIONS OF LAW
IN OPPOSITION TO THIRD-PARTY
DEFENDANT SHIRLEY MONROE'S
MOTION FOR SUMMARY JUDGMENT

I. FINDINGS OF FACT:

A. MONROE FUNCTIONED AS AN ERISA FIDUCIARY TO THE HEALTH PLAN AND 401(K) PLAN.

1. Shirley Monroe ("Monroe") admits that she had the responsibilities of payroll and human resources, and administrating the 401(k) and health benefit plan.

a. Declaration of Jennifer Chen, Exhibit A.

2. The Great-West online health plan order form shows Polly Jones and Shirley Monroe are plan administrators, and Monroe and Jones talked frequently, sometimes two and three times a day concerning the health plan.

a. Declaration of Jennifer Chen, Exhibit B.

3. Monroe personally made all payroll deductions, including deductions for the health benefit plan and 401(k) plan, from employees' paychecks.

a. Declaration of Jennifer Chen, Exhibit A.

b. Declaration of Jennifer Chen, Exhibit C.

4. The payroll service company ADP relied on the deduction information provided to them by Monroe each week to prepare actual paychecks.

a. Declaration of Jennifer Chen, Exhibit D.

5. Monroe, on behalf of Lassen, worked with the NLRB concerning Lassen's failure to properly remit deducted 401(k) plan contributions.

a. Declaration of Jennifer Chen, Exhibit E.

6. No one at Lassen, other than Monroe, was responsible for making payroll deductions for Wright-Bernet employees including all of the plaintiffs in this action.

a. Declaration of Jennifer Chen, Exhibit F.

7. No one at Lassen, other than Monroe, was responsible for communicating the payroll deductions information to ADP for Wright-Bernet employees including all of the plaintiffs in this action.

1 a. Declaration of Jennifer Chen, Exhibit G.

2 8. Monroe remained employed at Lassen during the entire time period that the health plan was
3 on and off administrative hold and it was clear that deducted health plan contributions were
4 not being properly remitted to the health insurance provider.

5 a. Declaration of Jennifer Chen, Exhibit H.

6 **B. MONROE BREACHED HER FIDUCIARY DUTIES AND CO-FIDUCIARY**
7 **DUTIES.**

8 9. While fully aware that Lassen was not remitting employees' deductions and contributions
9 to the health plan and 401(k) plan, Monroe was still making deductions on the employees'
10 paychecks.

11 a. Declaration of Jennifer Chen, Exhibit I.

12 10. Monroe did not ever express any concern to anyone at Lassen, ADP or insurer Great West
13 about the failure to remit deducted health plan contributions until July 2000.

14 a. Declaration of Jennifer Chen, Exhibit I.

15 11. Monroe had ample opportunities to inform and express her concern to the Lassen
16 management because she talked with the Lassen headquarters in Irvine at least once a day.

17 a. Declaration of Jennifer Chen, Exhibit J.

18 12. Monroe has never spoken with Crary about anything, including the health benefit plan and
19 401(k) plan and the contributions thereto.

20 a. Declaration of Jennifer Chen, Exhibit K.

II. CONCLUSIONS OF LAW:

A. MONROE FUNCTIONED AS AN ERISA FIDUCIARY TO THE HEALTH PLAN AND 401(K) PLAN BECAUSE SHE WAS THE ONLY PERSON AT LASSEN COMMUNICATING WEEKLY PAYROLL INFORMATION, INCLUDING HEALTH PLAN DEDUCTIONS, TO LASSEN'S PAYROLL SERVICE.

ERISA § 3(21)(A); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993); *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988).

B. MONROE BREACHED HER FIDUCIARY DUTIES AND CO-FIDUCIARY DUTIES, BECAUSE SHE DID NOTHING TO PREVENT THE FAILURE TO REMIT DEDUCTED CONTRIBUTIONS.

ERISA § 404(a)(1)(B); ERISA § 404(a)(1)(D); ERISA § 405(a), 29 U.S.C. § 1105(a)

C. MONROE BREACHED HER FIDUCIARY DUTIES AND CO-FIDUCIARY DUTIES, BECAUSE SHE CONTINUED DEDUCTING HEALTH PLAN CONTRIBUTIONS EVEN WHEN SHE KNEW THAT SUCH CONTRIBUTIONS WERE NOT BEING PROPERLY REMITTED.

ERISA § 404(a)(1)(B); ERISA § 404(a)(1)(D); ERISA § 405(a), 29 U.S.C. § 1105(a)

Dated: November 26, 2003

/s/ Stephen R. Felson

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CERTIFICATION OF SERVICE

I hereby certify that on November 26, 2003, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following.

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I further certify that on November 26, 2003, I served by following by ordinary U.S. Mail:

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/s/ Stephen R. Felson